SUPREME COURT, U.S.
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No. 10-484

In the Supreme Court of the United States

BRANT SITZES, Individually and as Joint Administrator of the Estate of Brittney Rae Sitzes, Deceased, et al.,
Petitioners,

v.

CITY OF WEST MEMPHIS, ARKANSAS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a government actor's professed belief as to the existence of an emergency situation trumps all other evidence as a matter of law for the purpose of invoking the intent-to-harm standard to determine if his actions violate the substantive due process clause of the Fourteenth Amendment.

2. Whether the lower court erred by expanding the degree of recklessness upheld under the intent-to-harm standard when applied to police driving, which results in the serious injury or death of citizens, particularly in response to a non-emergency, routine police call when the driving is alleged to be so grossly reckless as to exceed all prior cases upheld by the various circuits.

PARTIES TO THE PROCEEDING

BRANT SITZES, Individually and as Joint Administrator of the Estate of Brittney Rae Sitzes, Deceased; and as Parent and Next Friend of Shelby L. Sitzes, a Minor; NANCY SITZES, Individually and as Joint Administrator of Estate of Brittney Rae Sitzes, Deceased; and as Parent and Next Friend of Shelby L. Sitzes, a Minor, Petitioners

CITY OF WEST MEMPHIS, ARKANSAS; WILLIAM H. JOHNSON, Individually and in Official Capacity as Mayor of West Memphis, Arkansas; ROBERT PAUDERT, Individually and Official Capacity as Chief of Police, West Memphis, Arkansas; JAMES WRIGHT, Individually and in Official Capacity as Police Officer, West Memphis, Arkansas; ARKANSAS MUNICIPAL LEAGUE; WEST MEMPHIS CITY COUNCIL, Respondents

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I. STATEMENT OF THE CASE

A. FACTS RELEVANT TO THE PETITION

Officer Wright testified that on February 21, 2007, he was driving with his emergency lights and siren engaged to respond to a reported robbery and assault in West Memphis, Arkansas. Officer Wright was on patrol duty with the West Memphis Police Department (WMPD) at the time. This reported crime was within Wright's section of responsibility inside the city. Wright stated under oath that he considered this situation an emergency which required high speed driving. There was no direct evidence introduced at the trial court level to contradict Wright's subjective belief that he was responding to an emergency.

While traveling northbound on Rich Road, Wright approached the intersection with Arlington Road. Cars traveling on Rich Road at that intersection did not have a stop sign; cars on Arlington did have a stop sign. As Wright neared the intersection, at least one car was between Wright and the car driven by Brittney Sitzes. Evidence in the record showed that other cars yielded to Wright as he approached the intersection, but Sitzes did not. Rather than pull to the right curb as required by law, Sitzes turned her car left. This placed the Sitzes vehicle in Wright's path as he was passing cars on the left. Wright was unable to stop or otherwise avoid colliding with the Sitzes vehicle. Brittney Sitzes was killed in the collision and her sister, who was a passenger of the Sitzes vehicle, was injured.

Most notably, the Petitioners did not allege that Officer Wright intended to harm the Sitzes sisters or

to seize them. Further, no evidence was discovered and entered into the record that would support such an allegation. It is without dispute that the collision between Wright and the Sitzes vehicle was unintentional.

II. REASON FOR DENYING THE PETITION

The petitioners incorrectly assert that there is a split among the federal circuit courts of appeal as to the culpability standard to be applied in cases in which a police officer is driving at a high rate of speed in response to a call. The petitioners contend that the Eighth Circuit Court of Appeals has established a rule that is contrary to this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); however, that is simply not correct. The district court and the Eighth Circuit followed both precedent from this Court and also ruled consistently with other circuits' decisions interpreting the *Lewis* decision and its progeny.

It is important to note at the onset that the petitioners provided cases which either are clearly distinguishable or applied the same culpability standard as used by the trial and appellate courts and rendered rulings in favor of the officers and their respective cities. When cases present facts similar to those in the case at bar, the courts in all circuits have applied the intent-to-harm standard enunciated in this Court's *Lewis* decision. That standard has been fairly consistently followed by the lower courts, and when deviations have occurred the appellate courts have taken steps to get back in line with this Court's precedent. *See e.g. Feist v. Simonson*, 222 F.3d 455

(8th Cir. 2000), *overruled by Helseth v. Burch*, 258 F.3d 867, 871 (8th Cir. 2001).

It is clear that at the time of the action involved in this case that the constitutional law in effect would not have put Officer Wright on notice that his actions could have been deemed unconstitutional. Respondents urge this Court to note that this collision was in early 2007 and many of the cases cited by the petitioners were handed down subsequent to the collision. Therefore, even if the petitioners' arguments were persuasive in changing the culpability standard, it should have no bearing on whether Officer Wright was violating a clearly established constitutional right.

A. APPLICATION OF THE INTENT TO HARM STANDARD

As it relates to the Section 1983 claims pursuant to the Fourteenth Amendment, this Court and Eighth Circuit opinions analyze cases such as this under Substantive Due Process analysis. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) ("Such chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to substantive due process liability."); *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) ("The deliberate indifference standard 'is sensibly employed only when actual deliberation is practical.' By contrast, the intent-to-harm standard most clearly applies 'in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation.' .... In determining the requisite level of culpability in this case, we reject the ... conclusion that the controlling force of *Lewis* is limited to high-speed police driving aimed at apprehending a suspected

offender." (citing *Lewis*, 523 U.S. at 851; *Wilson v. Lawrence County*, 260 F.3d 946, 957 (8th Cir. 2001); *Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000)).

Petitioners argued below that the speed at which Officer Wright was traveling is relevant to the Court's analysis of liability – it is not. *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001) (Where officers chased a fleeing suspect through red lights and stop signs at up to 80 miles per hour and reached speeds of up to 100 miles per hour before the suspect collided with an innocent motorist, leaving the motorist a quadriplegic, killing one of the passengers, and seriously injuring three (3) juvenile passengers.) The Eighth Circuit in *Helseth* found that, notwithstanding extreme speeds, upon an application of the intent-to-harm standard, the officers were not liable. *Id.*, 258 F.3d at 872.

Petitioners also argued below that the situation was not reasonably regarded as an emergency by Officer Wright because he "volunteered" to provide back-up. But whether Wright could reasonably have decided that he was not needed as additional back-up is irrelevant. Under *Lewis*, the intent-to-harm culpability standard applies if Wright believed he was responding to an emergency call. *Terrell v. Larson*, 396 F.3d 975, 980 (8th Cir. 2005) ("On appeal, plaintiffs argue, as they did in the district court, that a jury could find that the situation was not reasonably regarded as an emergency by Larson and Longen because they 'volunteered' to provide back-up and then persisted in responding after being advised they were 'covered' and could 'cancel.' But whether Larson and Longen could reasonably have decided that they were not needed as additional back-up is irrelevant. Under

Lewis, the intent-to-harm culpability standard applies if they believed they were responding to an emergency call.").

In the preceding years before the collision that led this case, it was undeniable that the Eighth Circuit had announced a rule of law that would have allowed Officer Wright to conclude that his actions in this case were constitutionally permissible. In *Feist v. Simonson*, 222 F.3d 455 (8th Cir. 2000), a three-judge panel of Eighth Circuit rendered a decision which deemed the officer's culpability standard one of deliberate indifference in a high-speed driving circumstance. The very next year, a full Eighth Circuit opinion corrected that mistaken decision and ruled that in cases such as the one at bar the intent-to-harm standard is applicable. That was the law in place when Officer Wright collided with the Sitzes' vehicle.

It is clear that in this case, the requisite level of culpability is an intent-to-harm standard. The respondents, through their counsel, were not able to locate binding legal authority which would create constitutional liability on the basis of an unintentional automobile accident while the officer was engaged in high speed driving, when the officer subjectively believed he was responding to an emergency and had no intent to harm the plaintiff. To the contrary, even when an officer intends to crash into a car (such as to immobilize a fleeing suspect), there is only liability when the officer also intended to harm the other driver in a way that is not supported by legitimate government objectives.

B. CASES CITED BY PETITIONERS DO NOT SUPPORT THEIR CLAIM

The petitioners have asserted that the Eighth Circuit opinion in this case is in conflict with decisions in other circuits. (Pet. 13-17) Yet not one of the cases cited actually stands for the proposition that the Eighth Circuit applied any different standard in this case than in other cases with similar facts. Below is a short summary of the cases cited by the petitioners. It is clear that some are so factually dissimilar as to be legally inapplicable. However, in each of the cases with the same material fact pattern courts applied the intent-to-harm standard and held that there was no substantive due process violation.

Green v. Post, 574 F.3d 1294 (10th Cir. 2009).

The police officer in *Green* testified in his deposition that he was not responding to an emergency. *Green v. Post*, 574 F.3d 1294, 1297 (10th Cir. 2009). He was pursuing a car that had driven away from a gas station without paying for approximately $30.00 worth of fuel. *Id.*, 574 F.3d at 1296. While driving at a high rate of speed, the officer collided with a car that turned in front of him at an intersection. *Id.* The district court had concluded that the officer was not entitled to qualified immunity. *Id.*, 574 F.3d at 1297. The Tenth Circuit reversed the district court and remanded the case for entry of summary judgment on behalf of the defendants. *Id.*, 574 F.3d at 1310. Although this case was not evaluated exclusively on an intent-to-harm standard because it was not an emergency, the Tenth Circuit concluded that such fast driving even in a non-emergency did not rise even to a lower culpability

standard of conscience shocking deliberate indifference. *Id.*, 574 F.3d at 1304.

This recent case also has a very thorough analysis of the progeny of cases that have sprung from *Lewis*. The Tenth Circuit concluded that even in a non-emergency, the officer would not have known in 2006 that such high-speed driving would violate the substantive due process rights of the plaintiff, absent an intent to harm. The court also did not establish that, going forward, such driving would be unconstitutional, thereby putting officers on notice. Obviously, if it were not clearly established in 2009 that such non-emergency driving was unconstitutional, then in 2007, Officer Wright, in the case at bar, could not have been on notice that his driving would subject him or the City of West Memphis to civil liability.

Porter v. Osborn, 546 F.3d 1131 (9th Cir. 2008)

Porter v. Osborn was not an emergency driving case. 546 F.3d 1131, 1132 (9th Cir. 2008). In *Porter*, officers approached a person sleeping in a car on the side of the road. *Id.* The car's occupant did not comply with police orders and began moving the car toward the officers, leading to the driver's fatal shooting. *Id.* This case is too factually unlike the case at bar to have any precedential value. However, it is useful to note that in *Porter* the district court used deliberate indifference as the level of culpability and found that the facts warranted a jury trial. *Id.* The Ninth Circuit disagreed and held that the "purpose to harm standard" applied. The case was then remanded to see if the evidence was sufficient to meet the stricter standard.

Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002)

Ewolski v. City of Brunswick also did not involve emergency or high-speed driving; therefore, it too is distinguishable from the facts of the case at bar. 287 F.3d 492 (6th Cir. 2002). This case involved a hostage situation that lasted roughly eighteen hours during which time actual deliberation was made as to which tactics were to be employed to end the standoff. *Id.*, 287 F.3d at 511. The police repeatedly tried to forcibly enter the residence, repeatedly used tear gas, and rammed through both the garage door and the living room wall with an armored car. *Id.* 287 F 3d at 498-99. Eventually, the police searched the house to find the hostage taker and his son dead from a murder-suicide. *Id.* 287 F.3d at 499.

In that situation, the Sixth Circuit said that "The time for deliberation available to [the chief of police] in deciding how to respond to [the hostage taker's] actions distinguishes this case from those cases in which actual malice and an intent to harm was required." *Id.*, 287 F.3d at 511 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 837). Even in the above situation, using the deliberate indifference standard of culpability, the Sixth Circuit found that the police chief had not violated any substantive due process rights.

Wilkinson v. Torres, 610 F.3d 546 (9th Cir. 2010)

Wilkinson v. Torres did involve a car chase, as did the case before this Court; however, the car chase had ended and the police were on foot at the time they shot and killed the driver of a stolen vehicle. 610 F.3d 546,

549 (9th Cir. 2010). Regardless, there was a substantive due process claim in that case as there is in the present case. *Id.*, 610 F.3d at 554. Once again, because it was a rapidly evolving situation, the Ninth Circuit applied the purpose-to-harm standard and found that there was no substantive due process claim available in this situation.

The court noted "that 'deliberation' should not be interpreted in the narrow, technical sense, reasoning that the Supreme Court had rejected the deliberate indifference standard even in cases where an officer giving chase could have deliberated while pursuing the suspect. Instead, the heightened purpose-to-harm standard applies where a suspect's evasive actions force the officers to act quickly." *Id.*, 610 F.3d at 554 (citing *Porter v. Osborn*, 546 F.3d 1131, 1139-40 (9th Cir. 2008)). That is the same rationale that was applied by the Eighth circuit in the present case. It was applied appropriately.

Jones v. Byrnes, 585 F.3d 971 (6th Cir. 2009)

In *Jones v. Byrnes*, police officers were sued on allegations that they deprived a decedent of his Fourteenth Amendment substantive due process rights when the officers failed to suspend a car chase after the suspects extinguished the car's headlights. 585 F.3d 971, 973 (6th Cir. 2009). The officers claimed qualified immunity and the district court entered summary judgment for the officers, finding that the officers' actions did not "shock the conscience" as required by *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Id.* The district court further found that, even if the officers' conduct did "shock the conscience" for purposes of a violation of the decedent's

substantive due process rights, the officers were entitled to qualified immunity because it was not clearly established at the time of the incident that such conduct violated those rights. *Id.* The Sixth Circuit affirmed the decision to grant qualified immunity under these circumstances. *Id.*

C. CIRCUITS ARE NOT DIVIDED

In another section of petitioners' writ, they claim that different circuits "are divided over whether the intent-to-harm standard should be applied as a bright line rule to all police driving in response to an official call, whether an emergency or non-emergency." (Pet. 29) However, in that section of their petition the cases they cite as purportedly indicating some division among the circuits are not police driving cases. They cite *Zicardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir 2002), which they readily admit is not a police driving case. (Pet. 31) Rather, *Zicardi* is about paramedics who too roughly "snatch" someone from the ground – a far cry from the facts in the case at bar. (Pet. 31) In that section they also cite *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999), which was a case about a social worker and the removal of an abused child.

The cases that the petitioners cite that do involve police driving all apply the intent-to-harm standard articulated in *Lewis* and applied by the Eighth Circuit in the present case. Therefore, there is no demonstrated split among the circuits as it relates to this matter.

D. THE EIGHTH CIRCUIT OPINION IS NOT IN CONFLICT WITH THIS COURT'S OPINIONS

The petitioners argue forcefully that their petition should be granted because the Eighth Circuit is out of step with this Court's prior rulings. (Pet. 6-13, 17-29) Specifically, they point to the seminal case in this area of the law, *County of Sacramento v. Lewis*. 523 U.S. 833 (1998). Unlike many of the cases cited by the petitioner in an attempt so show the Eighth Circuit is in conflict with the other circuits, *Lewis* is very much on point. The holding is directly relevant to the decision whether to grant certiorari. In *Lewis*, as here, there was high-speed driving by an officer that resulted in an accidental collision and death. In the *Lewis* opinion, you stated, "Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." The Eighth Circuit applied this exact standard. It did not deviate from your precedent.

Contrary to the petitioners' argument, the opinion by the Eighth Circuit also specified that it was not creating a so-called bright line rule. It said that there could be instances in which there is evidence of bad faith or that the fact pattern was so preposterous as to demonstrate bad faith. (Pet. App. 15) However, that is not the case here. There is no direct evidence to contradict Wright's assertion that he believed there to be an emergency that prompted him to drive fast to get to the scene of an ongoing crime. This case is not making new law or deviating from this Court's precedents and therefore the petition should be denied.

III. CONCLUSION

The Eighth Circuit did not enter a decision that is in conflict with the decisions of other circuits or U.S. Supreme Court precedent. There is no other compelling reason for granting the petition for writ of certiorari. For the foregoing reasons, the respondents respectfully request that the present petition be denied.

Respectfully Submitted,

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